Supreme Court, U.S.
FILED

No. 10-584 OCT 29 2010

OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

Mary A. Jasso, et. al.

Petitioners
v.

California Department of Forestry, et. al.

Respondents, et. al.

Vol. 2
Appendix of Exhibits
to accompany
Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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EXHIBIT 1

Mandate issued by Ninth Circuit Court of Appeals, dated August 12, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 12 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ILLA L. GARCIA and MARY A. JASSO,
Plaintiffs - Appellants,
v.
CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION; et al.,
Defendants - Appellees.

No. 09-15916
D.C. No. 2:07-cv-02770-GEB-EFB
U.S. District Court for Eastern California, Sacramento

MANDATE

The judgment of this Court, entered June 22, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
Rhonda Roberts
Deputy Clerk

EXHIBIT 2

Order for Denial of Rehearing, Ninth Circuit Court of Appeals, dated August 3, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
ILLA L. GARCIA and MARY A. JASSO,
Plaintiffs - Appellants,
v.
CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION;
et al.,
Defendants - Appellees.
No. 09-15916
D.C. No. 2:07-cv-02770-GEBEFB
Eastern District of California,
Sacramento

ORDER

Before: CANBY, THOMAS, and W. FLETCHER, Circuit Judges.

Appellants' petition for panel rehearing is denied.

No further filings shall be accepted in this closed case.

FILED
AUG 03 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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EXHIBIT 3

Memorandum, Ninth Circuit Court of Appeals, dated, June 22, 2010

This disposition is not appropriate * for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

09-15916

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILLA L. GARCIA and MARY A. JASSO,

Plaintiffs - Appellants,

v.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION; et al.,

Defendants - Appellees.

No. 09-15916

D.C. No. 2:07-cv-02770-GEBEFB

MEMORANDUM*

Appeal from the United States District Court for the Eastern District of California

Garland E. Burrell, Jr., District Judge, Presiding

Submitted May 25, 2010**

Before: CANBY, THOMAS, and W. FLETCHER, Circuit Judges.

Illa L. Garcia and Mary A. Jasso appeal pro se from the district court's judgment dismissing their action claiming that defendants, California state agencies and officials, violated their civil rights, various federal statutes and regulations, and California common law by permitting their exposure to harmful levels of electromagnetic radiation at their workplace and then engaging in a coverup.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo dismissal under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). We may affirm on any grounds supported by the record. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). We affirm.

The district court properly dismissed the claims against the state agencies and individual defendants acting in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (a state agency, state and state officials acting in their official capacities are not persons susceptible of suit under § 1983).

The district court properly dismissed the first and second causes of action against the individual defendants acting in their personal capacities because a California state court previously reached a final adjudication on the merits of those causes of action in *Garcia v. Dep't of Forestry and Fire Protection*, Nos. C053667, C053793, 2007 WL 1520069 (Cal. App. May 25, 2007). *See Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 809 (9th Cir. 2007) (under California law, "[r]es judicata . . . prevents litigation of all grounds for . . . recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding") (citations and internal quotation marks omitted).

The district court properly dismissed the third cause of action against the individual defendants acting in their personal capacities. Plaintiffs failed to allege facts that would establish the deprivation of any constitutional rights. *See Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir. 1989) (failure to allege any actual deprivation of constitutional rights, and conclusory allegations of conspiracy, do not give rise to liability under § 1983); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam) (holding that § 1985 conspiracy claim

was properly dismissed because plaintiff had failed to allege facts establishing invidious discrimination). Moreover, the criminal statutes and federal regulation plaintiffs cite do not confer a private right of action. *See Aldabe*, 616 F.2d at 1092 (no civil liability obtains under 18 U.S.C. §§ 241 or 242). Finally, the claims under regulations promulgated by the Federal Communications Commission, as well as the claims of fraudulent concealment of allegedly excessive radiation levels, were litigated and decided in plaintiffs' earlier state court action. *See Jasso v. Cal. Dep't of Forestry*, Superior Court of California, County of Lassen No. 41697; *see also First Nat'l Bank v. Russell (In re Russell)*, 76 F.3d 242, 244-45 (9th Cir. 1996) (describing the elements of collateral estoppel under California law to be: (1) the issue decided in the earlier case is identical to the issue presented, (2) the earlier case culminated in a final judgment on the merits, and (3) the party against whom estoppel is asserted was a party to, or was in privity with a party to, the earlier case).

Plaintiffs' remaining contentions are unpersuasive.

AFFIRMED.

EXHIBIT 4

Order for Denial of Rule 59(e) Motion, District Court for the Eastern District of California, dated April 16, 2009.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
ILLA L. GARCIA; MARY A. JASSO,
02:07-cv-02770-GEB-EFB
Plaintiffs,
ORDER
v.
CALIFORNIA DEPARTMENT OF

FORESTRY AND FIRE PROTECTION; CALIFORNIA DEPARTMENT OF GENERAL SERVICES AND TELECOMMUNICATIONS DIVISION; CALIFORNIA DEPARTMENT OF JUSTICE; JERRY BROWN; CATHERINE GUESS; BARRY HEMPHILL; GLEN NASH; RICHARD WILLIAMS; MICHAEL D. ENSMINGER; AL MUIR; RICH ZANNI; BRAD LUTTS,
Defendants.

On April 6, 2009, Plaintiffs filed a "Motion to Alter or Amend a Judgment and/or Order Pursuant to Federal Court Rule 59(e)" based on their contention that they were not served with a copy of the Findings and Recommendations. However, the docket reveals service was made. Therefore, the motion is denied.
Dated: April 16, 2009
GARLAND E. BURRELL, JR.
United States District Judge

EXHBIT 5

Order, United States District Court for the Eastern District of California, dated March 30, 2009.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ILLA L. GARCIA, and
MARY A. JASSO,
Plaintiffs, 2:07-cv-2770-GEB-EFB-PS
vs.

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,
CALIFORNIA DEPARTMENT OF
GENERAL SERVICES AND
TELECOMMUNICATIONS DIVISION,
CALIFORNIA DEPARTMENT OF
JUSTICE, et al.,
ORDER
Defendants.

On March 12, 2009, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. No objections were filed.

Accordingly, the court presumes any findings of fact are correct. See Orland v. United States, 602 F.2d 207, 208 (9th Cir. 1999). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the proposed Findings and Recommendations in full.

Accordingly, IT IS ORDERED that:

1. The proposed Findings and Recommendations filed March 12, 2009, are
ADOPTED;
2. Defendants' motion to dismiss, Dckt. No. 18, is granted;
3. Plaintiffs' complaint is dismissed without leave to amend; and
4. The Clerk is directed to close the case.

Dated: March 30, 2009
GARLAND E. BURRELL, JR.
United States District Judge

Case 2:07-cv-02770-GEB-EFB Document 21 Filed 03/31/2009 Page 2 of 2

EXHIBIT 6

Findings and Recommendations, District Court for the Eastern District of California, dated March 12, 2009

Case 2:07-cv-02770-GEB-EFB Document 20 Filed 03/12/2009 Page 1 of 17

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ILLA L. GARCIA, and
MARY A. JASSO,
Plaintiffs, No. CIV S-07-2770 GEB EFB PS
vs.
CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,
CALIFORNIA DEPARTMENT OF
GENERAL SERVICES AND
TELECOMMUNICATIONS DIVISION,
CALIFORNIA DEPARTMENT OF
JUSTICE, et al.,
FINDINGS AND RECOMMENDATIONS
Defendants.
/

Defendants' third amended motion to dismiss plaintiffs' complaint was submitted for decision on the papers by order of this court filed August 25, 2008.[1] For the following reasons, the court recommends that defendants' motion be granted, and that plaintiffs' complaint be dismissed without leave to amend.

1 This case, in which the plaintiffs are proceeding in propria persona, is referred to the undersigned under Local Rule 72-302(c)(21).

pursuant to 28 U.S.C. § 636(b)(1). This case is related to Mary A. Jasso, et al. v. Citizens Telecommunications Company of California, Inc., etal., Civ. S-05-2649 GEB EFB PS.

BACKGROUND

In their complaint filed December 26, 2007, plaintiffs allege that they previously worked for defendant California Department of Forestry and Fire Protection ("CDF"), as seasonal lookouts at the Likely Mountain Lookout site ("Likely Mountain") in Lassen County, California. Plaintiff Illa Garcia worked there for three fire seasons from 2000 through 2002; plaintiff Mary Jasso worked there for eleven fire seasons from 1992 through 2002. Complaint, ¶¶ 7, 8. According to the complaint, CDF and defendant California Department of General Services Telecommunications Division ("GSTD"), installed, operated and leased at Likely Mountain "various antennae which do and/or did emit and radiate toxic radiofrequency, microwave and electromagnetic radiation" during the years 1992 through 2002. Id. at ¶ 6. Plaintiffs allege that these telecommunication devices emitted harmful radiation which created larger radiation fields, and this radiation was transmitted to plaintiffs, particularly through the metal structures and pieces of equipment with which they were required to work.[2] Id. at ¶¶ 10, 11. Plaintiffs allege that they both became ill in July 2002, Jasso becoming permanently disabled in October 2002, Garcia becoming permanently disabled in April 2004. Id. at ¶¶ 14, 15. Based on their theory formed November 2003 that their illnesses were caused by the radiation to which they were exposed while working at Likely Mountain, both plaintiffs obtained medical testing beginning February 2004, pursuant to which "the Plaintiffs were found to have toxic brain and blood cell damage, tumors, cataracts, tremors, loss of hearing, breathing difficulties, paralysis and other physical damage to their bodies." Id. at ¶¶ 16, 17; see also ¶ 26 ("plaintiffs have, and/or are already

[2] Plaintiffs assert that the radiation fields "couple to and/or eradiate off, nearby metal structures and do couple to the human body, having a predilection for water based biological organs and said radiation fields then genera[te] high radiofrequency voltage and create hazardous shock/burns and injury for those so exposed. Plaintiffs do allege they suffered continuous daily[] shock/burn phenomena when they touched metal surfaces at LMT, including the kitchen sink in the living quarters provided by defendant CDF." Complaint, at ¶ 10. Plaintiffs list the several metal objects they were required to inhabit and handle, e.g., the LMT lookout tower and temporary living quarters, transmitting equipment, generator, binoculars, map ring, chairs and vehicles. Id. at ¶ 11.

suffering from memory loss, confusion, anxiety, depression, time lapses and Alzheimer's and dementia-like symptoms").

Plaintiffs allege that defendants CDF and GSTD were required to post warnings of radiation exposure at LMT, and to implement other safety procedures (e.g., verbal warnings, preventive training) that would have provided plaintiffs with a hazard-free work environment. Id. at ¶ 6. Plaintiffs allege that once they informed defendants of their medical problems, these defendants, along with defendant California Department of Justice, and non-parties California Department of Transportation, California Insurance Fund, California Fire Fighters, and others, "conspir[ed] to conceal the true facts of radiation levels that could be found at [L]ikely Mountain between the years 1992 through 2002," and submitted "false and misleading documents and statements to the Courts and regulatory entities . . . that are in place to protect the plaintiffs' interests." Id.

Plaintiffs allege three causes of action pursuant to 42 U.S.C. § 1983, based on their broad contentions they were denied due process and equal protection by defendants: (1) negligent failure to protect plaintiffs from injury (also relying on 18 U.S.C. § 242); (2) knowing failure to

defendants' released copies of the *Original Field Notes* for the radiation testing they had conducted at Likely Mountain, in February 2005, and that they had withheld from Discovery and subpoena.

The *Field Notes* authored by Michael Ensminger, did show the aforementioned defendants reports and statements made and/or submitted to the state and federal courts, allegedly, were false and for the reasons stated below"

1. The defendants have repeatedly claimed to the courts, they tested all the frequencies at their telecommunications site at Likely Mountain and found no levels of radiation that were above that allowed by Law (Title 47 C.F.R. §1.1310). The actual *Field Notes* of the tests, did show the defendants tested only 7 frequencies. The *Field Notes* also did show that none the state's microwave frequencies that are in operation at Likely Mountain, were included in the testing process. Appellant has learned the State microwaves by all known consensus emit radiation in excess of 100 times over that allowed by Law for human exposure pursuant to Title 47 C.F.R. §1.1310.

2. Federal records do show there are 47 different frequencies in operation at the State's telecommunications site at Likely Mountain. Thus the defendants' knowingly omitted 40 frequencies including all the **microwave frequencies** from their tests, reports and testimony and sworn statements to the Courts, stating they tested all the frequencies. [D.C. Dkt. 7. Plntf. Attach. #1. Exhibits, D, E, F, & G. (see Vol. 2. App. Ex. 8. pg. 32)].

3. The difference between the defendants' and/or their employees reports and sworn statements and federal records show the defendants have allegedly and in concert together, engaged in a cover-up of their negligence under color of law, to essentially escape liability for the plaintiffs'

The demurrers were upheld in a consolidated appeal to the California Court of Appeal, Third Appellate District. Id. at Exh. C (Case Nos. CO53667 and CO53793). In a decision filed May 25, 2007, Justice Raye, writing for a three-judge panel, analyzed the "public policy" exception to the exclusivity of the worker's compensation system in considering plaintiffs' contentions based on state and federal statutes and regulations, specifically, 8 C.C.R. § 8618, 47 U.S.C. § 1.1307, and 18 U.S.C. § 1864. Citing numerous cases, Justice Raye concluded:

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3 The court takes judicial notice of the state court procedural history, Mullis v. U.S. Bankruptcy Court, 828 F.2d 1385, 1388 (9th Cir. 1987), and the matters of public record from that litigation, including pleadings, orders, and other papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986). See, generally, United States v. Ritchie, 342 F. 3d 903, 907-908 (9th Cir. 2003) (a court may consider such materials without converting a motion to dismiss into a motion for summary judgment); see also Fed. R. Evid. 201 (a court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned).

While plaintiffs cite various laws and regulations they assert defendants violated, they cite no authority, and we have found none, for their proposition that these types of statutory violations regarding operations of telecommunications towers are considered conduct contrary to fundamental public policy of the state as that concept has been narrowly construed in both workers' compensation and wrongful termination cases. Particularly in workers' compensation cases, the exception to the rule of exclusivity is narrowly drawn to preserve the legislative balance securing a prompt recovery for injured workers while simultaneously limiting the employers' exposure to tort liability. . . . We therefore conclude that because plaintiffs, state employees, affirmatively allege they were injured while in the course and scope of their employment, no civil

action will lie and the trial court properly sustained the demurrer. . . . [T]he exclusive remedy of workers' compensation bars a state employee's claims against another state agency. All defendant state agencies were properly dismissed.
Id. at pp. 4, 9-10, 12

The Court of Appeal also rejected appellant's civil rights claims, reasoning:

> *Plaintiffs also make repeated references to violations of their civil rights, citing to various provisions of the state and federal Constitutions. We are somewhat perplexed as to the meaning of these allegations. Their sweeping allegations that defendants' operation of the telecommunication facilities, failure to warn, and failure to monitor radioactivity levels, violated their inherent rights to be free of harm, if accepted, would dismantle the workers' compensation system because every injured employee would contend his or her employer's harmful conduct violated the fundamental public policy of the state as embodied in the Constitution. Courts have been careful to narrowly construe the exception to exclusivity so as not to intrude into the Legislature's constitutional prerogative to implement a workers' compensation system.* Id. at pp. 10-11

Thereafter, the California Supreme Court summarily denied review, see Request for Judicial Notice, filed by Deputy Attorney General James W. Walker, Dckt. No. 5, Item 2, and the U.S. Supreme Court denied plaintiffs' petitions for writ of certiorari and for rehearing. Id. at Item 3.

LEGAL STANDARDS

A. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(1): Lack of Subject Matter Jurisdiction "When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." Tosco Corporation v. Com-munities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001) (citations and internal quotations omitted).

Different standards apply to a 12(b)(1), motion, depending on the manner in which it is made. See, e.g., Crisp v. United States, 966 F. Supp. 970, 971-72 (E.D. Cal. 1997). If the motion attacks the complaint on its face, generally referred to as a "facial attack," the court considers the allegations of the complaint to be true, and plaintiff enjoys "safeguards akin to those applied when a Rule 12(b)(6) motion is made." Doe v. Schachter, 804 F. Supp. 53, 56-57 (N.D. Cal. 1992). On the other hand, if the motion makes a "factual attack" on the truth of the jurisdictional facts underlying the complaint, generally referred to as a "speaking motion," the court need not presume the factual allegations of the complaint to be true, but must employ the evidentiary standards for considering a motion for summary judgment, furnishing all parties an opportunity to supplement the record. See, e.g., Thornhill Pub. Co. v. General Tel. & Electronics Corp., 594 F. 2d 730, 733 (9th Cir. 1979); Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F. 2d 1553, 1558 (9th Cir. 1987). However, this "conversion" rule does not apply when, as here, "the additional facts considered by the court are contained in materials of which the court may

take judicial notice." Barron v. Reich ,13 F.3d 1370, 1377 (9th Cir. 1994) (citation omitted). Since this court, in considering the instant motions, relies exclusively on the pleadings in this case, the judicially noticed orders and pleadings filed in plaintiffs' state court proceedings, see n. 3, supra, and plaintiffs' currently pending related federal case, see n. 1, supra, defendants' challenge to this court's subject matter jurisdiction remains facial, and the court's review rests on the traditional standards applicable thereto.

B. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6): Failure to State a Claim In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). "'The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.'" Id., quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) (internal punctuation omitted). Rather, to avoid a Rule 12(b)(6) dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Weber v. Dep't of Veterans Affairs, 521 F.3d 1061, 1065 (9th Cir. 2008), quoting Bell, at 127 S.Ct. at 1974.

Dismissal may be based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). The complaint's factual allegations are accepted as true. Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984). The court construes the pleading in the light most favorable to plaintiff and resolves all doubts in

plaintiff's favor. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). General allegations are presumed to include specific facts necessary to support the claim. NOW, Inc. v. Schiedler, 510 U.S. 249, 256 (1994) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). The court may disregard allegations contradicted by the complaint's attached exhibits. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998). Furthermore, the court is not required to accept as true allegations contradicted by judicially noticed facts. Mullis, 828 F.2d at 1388. The court may consider matters of public record, including pleadings, orders, and other papers filed with the court. Mack, 798 F.2d at 1282 (9th Cir. 1986) (abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991)). Finally, "[t]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Neither need the court accept unreasonable inferences or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Unless it is clear that no amendment can cure its defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before dismissal without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1127-28 (9th Cir.2000) (en banc); Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir.1987).

DISCUSSION

A. Lack of Subject Matter Jurisdiction

1. Application of the Rooker-Feldman Doctrine

Plaintiffs' first and second causes of action sound in tort, while their third claim asserts abuse of powers associated with the alleged concealment of information in the state court proceedings. At the heart of plaintiffs' claims is the implicit request that this court overturn the reasoned conclusion of the state courts that plaintiffs' exclusive remedies, at least against defendants CDF and GSTD, lay with the state workers' compensation system. However, as explained below, this court is without jurisdiction to reconsider this conclusion.

"The Rooker-Feldman doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments. See Henrichs v. Valley View Dev., 474 F.3d 609, 613 (9th Cir.2007); see also D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482-86 [] (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 [] (1923). We have recognized that '[t]he clearest case for dismissal based on the Rooker-Feldman doctrine occurs when a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.' Henrichs, 474 F.3d at 613. (internal quotation marks omitted). [¶] However, Rooker-Feldman may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine 'prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment.' Kougasian v. TMSL, Inc., 359 F.3d 1136, 1139 (9th Cir. 2004) (citing Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003)). A federal action constitutes such a de facto appeal where 'claims raised in the federal court action are "inextricably intertwined" with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules.' Bianchi, 334

F.3d at 898. In such circumstances, 'the district court is in essence being called upon to review the state court decision.' Feldman, 460 U.S. at 483 n. 16 []." Reusser v. Wachovia Bank, N.A., 525 F.3d 855, 858 -859 (9th Cir. 2008). The doctrine applies to individuals who were parties to the state court proceeding. Johnson v. De Grandy, 512 U.S. 997,1006 (1994).

Plaintiffs' first and second claims, alleging negligent and intentional torts, were thoroughly considered and rejected by the state courts, as least as to common defendants California Department of Forestry and Fire Protection, and California Department of General Services Telecommunications Division. Recasting these claims as federal civil rights violations does not avoid application of the Rooker-Feldman doctrine nor, therefore, the conclusion of the state courts that plaintiffs' exclusive remedies lay with the state workers' compensation system.

Nor does plaintiffs' third claim avoid application of the Rooker-Feldman doctrine, although for different reasons. Plaintiffs contend that defendants CDF and GSTD, upon learning of plaintiffs' allegations of radiation exposure and injuries, "failed to investigate or police themselves or their lessees." Compl., ¶ 31. Plaintiffs state that they them-selves were required to notify defendants' lessees, Modoc National Forest Service and Federal Bureau of Land Managment, in April 2004 of the safety issues at Likely Mountain. Plaintiffs contend that defendants and/or their employees gave false reassurances to government agencies, and produced documents reflecting tests conducted in February 2005 and September 2006 which found that radiation levels on Likely Mountain did not exceed Federal Communications Commission standards. Plaintiffs contend that defendants submitted these allegedly false test results and documents "to various Courts and government agencies as proof the plaintiffs were not injured," and "fraudulently conceal[ed] the true

levels of radiation and the hazardous conditions," on Likely Mountain, id. at ¶¶ 6, 28-37, thus obstructing justice by defrauding the courts, as well as hindering plaintiffs' efforts to obtain economic relief and medical care. Apparently in response to the finding of Justice Raye that "[p]laintiffs do not allege a fraudulent cover-up, as in Johns-Manville [Products Corp. v. Superior Court, 27 Cal.3d 465 (1980)], that aggravated their injuries once defendants became aware of the radioactive poisoning," Exh. C, at p. 9,[4] plaintiffs now expressly make that contention, an allegation so broad as to include newly added defendants California Attorney General's Office and the state Attorney General.

A federal suit alleging extrinsic fraud in a state court proceeding is not barred by Rooker-Feldman. See, e.g., Kougasian, supra, 359 F.3d at 1140-41. (However, an allegation of extrinsic fraud does not, alone, create federal subject matter jurisdiction.) "Extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. Rooker-Feldman therefore does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that fraud." Id. at 1141. "The focus of

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4 While not framed as a "fraudulent coverup" in state court, plaintiffs' allegations of intentional malfeasance by defendants were squarely presented to the state courts. The Court of Appeal opinion recounts plaintiffs' claims of defendants' "egregious misconduct," and that "defendants 'concealed all facts of the hazardous and dangerous' exposure to radiation on Likely Mountain," Exh. C, at pp. 2, and 3. The court specifically noted that:

[T]he Labor Code does not exonerate defendants from any malfeasance. Rather, it establishes a different forum for the redress of the injuries Jasso [and Garcia] sustained during the course and scope of her employment. If, as plaintiffs allege, defendants violated both state

and federal statutes, as well as state and federal constitutional rights, and abrogated their duties to protect, warn, and safeguard the employees who manned the lookout towers on Likely Mountain, they should be held accountable for their dereliction of duty. We do not condone either any intentional or negligent conduct. But the propriety of their conduct is not before us; we consider only the venue in which their conduct will be addressed.

Id. at pp. 11-12.

such claim is not on whether a state court committed legal error, but rather on a wrongful act by the adverse party." Reusser, supra, 525 F.3d at 859 (citations and internal quotations omitted).

Plaintiffs extrinsic fraud claim lacks foundation both in the present complaint and as set forth in plaintiffs' related action also pending before this court. In this case, the complaint fails to allege sufficient facts upon which to base a claim for extrinsic fraud. They offer no specific facts or particularized details in support of their allegation that the 2005 and 2006 state test results, or documents prepared thereon, were inherently "false and misleading," nor that radiation levels on Likely Mountain were impermissibly elevated during the years 1992 to 2002. More significantly, as discussed in plaintiffs' related case before this court, the absence of any evidence of radiation testing on Likely Mountain for the relevant period, as independently concluded by the state court in separate actions involving these plaintiffs – and, most significantly, the failure of plaintiffs to appeal the state court decisions on the extrinsic fraud grounds they assert were then apparent – decisively undermine plaintiffs' extrinsic fraud claim in this court.

Since plaintiffs fail to state a prima facie claim for extrinsic fraud, all of their claims against defendants California Department of Forestry and Fire Protection, and California Department of General Services Telecommunications Division, are barred by the Rooker-Feldman

doctrine, and this court is without jurisdiction to consider these matters.

2. Eleventh Amendment Immunity

a. State Agency Defendants

Moreover, this court is without subject matter jurisdiction to consider plaintiffs' action against defendant state agencies California Department of Forestry and Fire Protection, the California Department of General Services Telecommunications Division, and the California Department of Justice, based on principles of sovereign immunity.

Neither a state nor its officials acting in their official capacities are "persons" under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Rather, the Eleventh Amendment to the U.S. Constitution protects states and state agencies from § 1983 liability absent their clear and unequivocal waiver and consent to suit. Quern v. Jordan, 440 U.S. 332, 337-345 (1979). The Eleventh Amendment's protection of state sovereign immunity extends to suits by citizens against their own states. Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 72-73, (2000). "The Eleventh Amendment's jurisdictional bar covers suits naming state agencies and departments as defendants, and applies whether the relief sought is legal or equitable in nature." Brooks v. Sulphur Springs Valley Electric Cooperative, 951 F.2d 1050, 1053 (9th Cir. 1991) (citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100, 104 (1984) (fn omitted). See also In re Pegasus Gold Corporation, 294 F.3d 1189, 1195 (9th Cir. 2005) (agencies of the state are immune from private damage actions in federal court).

Accordingly, the Eleventh Amendment provides an alternative basis for dismissing plaintiffs' claims, without leave to amend, against the California Department of Forestry and Fire Protection and the California

Department of General Services Telecommunications Division, as well as the California Department of Justice.
b. Official Capacity Suits Against Individual State Defendants The remaining nine defendants (the court does not consider "Does 1-100"), all state officials or employees,[5] are sued in both their individual and official capacities. However, a suit against a state

[5] The remaining nine defendants are:
1. Jerry Brown, California Attorney General;
2. Catherine Guess, Deputy Attorney General;
3. Barry Hemphill, Deputy Director, California Department of General Services
Telecommunications Division;
4. Glen Nash, Engineering Services Section Head for California Department of General Services Telecommunications Division;
5. Richard Williams, Senior Telecommunications Engineer, California Department of General Services Telecommunications Division;
6. Michael D. Ensminger, Associate Engineer, California Department of General Services Telecommunications Division;
7. Al Muir, Operations Region 2 Manager, California Department of General Services Telecommunications Division;
8. Rich Zanni, Area No. 2 Supervisor, California Department of General Services Telecommunications
Division; and,
9. Brad Lutts, Unit Chief Modoc Lassen Unit, California Department of Forestry and Fire Protection.

official is the same as a suit against the state, and a state official acting in his or her official capacity is not a "person" subject to liability under § 1983. Will, supra, 491 U.S. at 71. The exception is an official-capacity suit for prospective injunctive relief, id., at 71, n. 10, which plaintiffs do not seek in this action and which would not compensate them for their alleged injuries.

Accordingly, this court is without jurisdiction to consider plaintiffs' claims against the individually named

defendants in their official capacities, and these defendants must also be dismissed.

The court therefore concludes that it is without subject matter jurisdiction to consider plaintiffs' claims against any defendant state agency or any state employee in their official capacity.

B. Failure to State a Claim What remains of plaintiffs' complaint is an amalgam of civil rights claims against state officials and employees in their personal capacities only. Because pro se litigants are generally entitled to notice and an opportunity to amend their complaints before dismissal without leave to amend, Lopez. v. Smith, 203 F.3d at 1127-28, the court proceeds to demonstrate that no amendment can cure the defects of the instant complaint.

While money damages are available against officials in their personal capacity, a showing of personal involvement in the alleged violations is required.[6] The complaint makes no assertion of personal involvement by any individually named defendant in the conduct

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6 "Liability under section 1983 arises only upon a showing of personal participation bythe defendant. Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979). A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under section 1983. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984)." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

challenged by plaintiffs – significantly, none of the individually named defendants are mentioned other than in the caption of the complaint. Moreover, as set forth below, the complaint does not imply any reasonable basis upon which plaintiffs can state a claim of personal involvement by any individually named defendant.

1. Failure to State a Claim under 42 U.S.C. § 1983

Plaintiffs' § 1983 claims[7] are premised generally on the alleged violation of plaintiffs' rights to due process and equal protection under the U.S. Constitution; however, neither right creates a cause of action based upon these facts.

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." Plaintiffs claim that they have been deprived "of life and memories of life" and "denied the freedom to choose what toxic exposure risks they would allow themselves to be exposed to." Compl., ¶ 22. However, "[m]ere negligence or lack of due care by state officials in the conduct of their duties does not trigger the substantive due process protections of the Fourteenth Amendment and therefore does not state a claim under section 1983." Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989).

Similarly,"[t]o state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiffs claim that they were

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[7] Section 1983 provides that "(e)very person who, under color of any statute of any state. . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." Section 1983 does not, in itself, confer any substantive rights, but provides a separate right of action for violation of substantive rights secured by other federal statutes and the federal constitution. See Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995); Maine v. Thiboutot, 448 U.S. 1, 4 (1980). To establish a prima facie case under §1983, plaintiffs must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the

conduct violated a right secured by the Constitution and laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988).

"denied the equal protection of the laws enacted to protect those who worked at telecommunication sites." Complaint, ¶ 22. However, plaintiffs do not contend or otherwise demonstrate that they are members of pro-tected class and do not, therefore, state an equal pro-tection claim. The same omission undermines plaintiffs' claims pursuant to 42 U.S.C. § 1985.[8]

2. Failure to State a Claim Under Federal Criminal Statutes Common to each of plaintiffs' causes of action is the contention that defendants violated the federal criminal statutes set forth at 18 U.S.C. §§ 241, 242, or 1864(a)(3). However, these statutes establish criminal penalties for violation of an individual's civil rights; they do not create private rights of action. See, e.g., Peabody v. United States, 394 F.2d 175, 177 (9th Cir.1968).

Accordingly, plaintiffs do not, and cannot, state a claim pursuant to 18 U.S.C. §§ 241, 242, or 1864.

3. Failure to State a Claim Under OSHA Plaintiffs rely on several state and federal Occupational Safety and Health Act ("OSHA") provisions, e.g., the "General Duty Clause" of Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 654 (setting forth the duties of employers and employees), including federal OSHA regulations concerning the telecommunications industry, specifically, 29 C.F.R. § 1910.268(a)(3), (c)(1)(p)(2) and (3). However, these provisions do not create private rights of action. See, e.g., Crane v. Conoco, Inc., 41 F.3d 547, 533 (9th Cir. 1994); see also International Union, et al. v. Johnson Controls, Inc., 499 U.S. 187, 214 (1991) ("OSHA does not provide a private cause of action for violations of OSHA or its implementing regulations).

8 Plaintiffs rely on 42 U.S.C. § 1985 in support of their allegation that defendants conspired to submit false and misleading information to the state courts. However, plaintiffs do not contend that the alleged conspiracy was motivated by racial or other invidious discrimination. See 42 U.S.C. § 1985(3); see also, e.g., Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir.1992). Accordingly, plaintiffs do not state a claim pursuant to 42 U.S.C.
§ 1985.

4. Failure to Allege any Other Federal Claim

The only remaining federal authority relied on by plaintiffs are the FCC regulations establishing maximum human exposure limits for radio frequency radiation, presented in support of their extrinsic fraud contention, 47 C.F.R. §§ 1.1310, and 1.1307(b). The court has addressed the lack of foundation for this contention and, in the related case noted supra, addresses the failure of plaintiffs to state any claim under these provisions.

To the extent that plaintiffs' tort claims, based on the alleged negligent and intentional failure of defendants to protect plaintiffs, may be made against an individual defendant, they – and defendants' vigorous statute of limitations defenses – are grounded in state common law. Since a federal court should not exercise pendent jurisdiction over state claims in the absence of federal subject matter jurisdiction, see United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966), there remains no basis for this action to proceed in this court.

CONCLUSION

For the foregoing reasons, this court finds that the facts of this case – including their full consideration by the state courts against the principal defendants – demonstrate no reasonable possibility that plaintiffs can amend the present complaint to demonstrate this court's subject matter jurisdiction or state a claim upon which relief can be granted.

Accordingly, it is hereby RECOMMENDED that:

1. Defendants' motion to dismiss, Dckt. No. 18, be granted,

2. Plaintiffs' complaint be dismissed without leave to amend; and

3. The Clerk be directed to close the case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 12, 2009.

s/Edmund F. Brennan
United States Magistrate Judge

EXHIBIT 7

Docket Log sheet for District Court,
Eastern District of California,
case No. CIV S-07-2770 GEB EFB PS.

APPEAL, CIVIL, CLOSED, PRO_SE
U.S. District Court
Eastern District of California – Live System
(Sacramento)
CIVIL DOCKET FOR CASE #:
2:07-cv-02770-GEB-EFB
(PS) Garcia, et al v. CA Dept. of Forestry, et al
Assigned to: Judge Garland E. Burrell, Jr

Referred to: Magistrate Judge Edmund F. Brennan
Cause: 42:1981 Civil Rights
Date Filed: 12/26/2007
Date Terminated: 03/31/2009
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff
Illa L. Garcia represented by **Illa L. Garcia**
P.O. Box 585
Bieber, CA 96009
PRO SE

Plaintiff
Mary A. Jasso represented by **Mary A. Jasso**
P.O. Box 85
Likely, CA 96116
PRO SE

V.

Defendant
California Department of Forestry and Fire Protection
represented by **James Wayne Walter**
Attorney General's Office of the State of California
P.O. Box 944255
1300 I Street
Suite 125
Sacramento , CA 94244-2550
(916) 324-0244
Fax: (916) 322-8288
Email: james.walter@doj.ca.gov
LEAD ATTORNEY

Defendant
California Department of General Services and Telecommunications

Division
represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
California Department of Justice represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Jerry Brown represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Catherine Guess represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Defendant
Barry Hemphill represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Defendant
Glen Nash represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Richard Williams represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Michael D. Ensminger represented by **James Wayne Walter**
(See above for address)

LEAD ATTORNEY
Defendant
Al Muir represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Rich Zanni represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY
Defendant
Brad Lutts represented by **James Wayne Walter**
(See above for address)
LEAD ATTORNEY

Date Filed	#	Docket Text
12/26/2007		RECEIPT number #CAE200003598 $350.00 fbo Mary Jasso by Tiff Jasso on 12/26/2007. (Kastilahn, A) (Entered: 12/26/2007)
12/26/2007	1	COMPLAINT against all defendants by Mary A Jasso. (Kastilahn, A) (Entered: 12/26/2007)
12/26/2007	2	SUMMONS ISSUED as to *Glen Nash, Richard Williams, Michael D. Ensminger, Al Muir, Rich Zanni, Brad Lutts, California Department of Forestry and Fire Protection, California Department of General Services and Telecommunications Division, California Department of Justice, Jerry Brown, Catherine Guess, Barry Hemphill* with answer to complaint due within *20* days. *Illa Garcia* *P.O. Box 585* *Bieber, CA 96009*. (Kastilahn, A) (Entered: 12/26/2007)
12/26/2007	3	CIVIL NEW CASE DOCUMENTS ISSUED; (Kastilahn, A) (Entered: 12/26/2007)

12/26/2007	4	CIVIL NEW CASE DOCUMENTS ISSUED;Initial Scheduling Conference set for 6/4/2008 at 10:00 AM in Redding (CMK) before Magistrate Judge Craig M. Kellison. (Attachments: # 1 Consent Forms) (Kastilahn, A) (Entered: 12/26/2007)
03/11/2008	5	MOTION to DISMISS for LACK of JURISDICTION by Glen Nash, Richard Williams, Michael D. Ensminger, Al Muir, Rich Zanni, Brad Lutts, California Department of Forestry and Fire Protection, Barry Hemphill. Attorney Walter, James Wayne added. Motion Hearing set for 4/18/2008 at 09:00 AM in Courtroom 3 (MCE) before Judge Morrison C. England Jr. (Attachments: # 1 Declaration of James W. Walter with Exhibits, # 2 Request for Judicial Notice with exhibits)(Walter, James) (Entered: 03/11/2008)
03/11/2008	6	MINUTE ORDER (Text Only): Pursuant to Local Rule 72-302(c)(21), this case is referred to the assigned Magistrate Judge, Craig M. Kellison, for all purposes. Defendants' 4/18/2008 Motion to Dismiss 5 is vacated. Defense counsel is ordered to renotice the motion before Judge Kellison. Signed by Judge Morrison C. England, Jr on 3/11/2008. (Deutsch, S) (Entered: 03/11/2008)
03/11/2008		SERVICE BY MAIL: 6 Minute Order served on Illa L. Garcia, Mary A Jasso. (Deutsch, S) (Entered: 03/11/2008)
03/12/2008	7	AMENDED NOTICE of MOTION to DISMISS for LACK of JURISDICTION *Amended Notice* by Glen Nash, Richard Williams, Michael D. Ensminger, Al Muir, Rich Zanni, Brad

		Lutts, CA Department of Forestry and Fire Protection, Barry Hemphill. Motion Hearing set for 4/23/2008 at 10:00 AM in Redding (CMK) before Magistrate Judge Craig M. Kellison. (Walter, James) Modified on 4/15/2008 (Reader, L). (Entered: 03/12/2008)
03/27/2008	8	MEMORANDUM/RESPONSE in OPPOSITION re 7 MOTION to DISMISS for LACK of JURISDICTION. (Attachments: # 1 Exhibit)(Kaminski, H) (Entered: 03/28/2008)
04/10/2008	9	Defendants' REPLY to Plaintiff's OPPOSITION to 5 MOTION to DISMISS Attorney Walter, James Wayne added. (Walter, James) Modified on 4/14/2008 Mena-Sanchez, L). (Entered: 04/10/2008)
04/14/2008	10	NOTICE of RELATED CASES 2:07-cv-02769 2:05-cv-02649 by plaintiff Mary A Jasso. (Marciel, M) (Entered: 04/14/2008)
04/15/2008	11	ORDER signed by Magistrate Judge Craig M. Kellison on 4/14/2008 ORDERING 7 Pursuant to Eastern District of California Local Rule 78-230(h), the hearing on this motion, scheduled for April 23, 2008, at 10:00 before the undersigned in Redding, California, is hereby taken off calendar and the matter is SUBMITTED on the record and briefs. (Reader, L) (Entered: 04/15/2008)
04/15/2008		SERVICE BY MAIL: 11 Order, Motions Submitted/Under Advisement, served on Illa L. Garcia, Mary A Jasso (Reader, L) (Entered: 04/15/2008)
04/21/2008	12	ORDER signed by Magistrate Judge Craig M. Kellison on 4/21/2008

		ORDERING the court finds it appropriate to vacate the Status Conference pending resolution of dfts' motion to dismiss. If the motion to dismiss is not case dispositive, the court will re-set this matter for a Status/scheduling conference.(Matson, R) (Entered: 04/21/2008)
04/21/2008		SERVICE BY MAIL: 12 Order, served on Illa L. Garcia, Mary A Jasso. (Matson, R) (Entered: 04/21/2008)
05/05/2008	13	RELATED CASE ORDER signed by Magistrate Judge Edmund F. Brennan on 5/5/2008 ORDERING that cases 2:07-cv-2769 FCD EFB (PS) and 2:07-cv-2770 MCE CMK (PS) be, and the same hereby are, reassigned to Judge Garland E. Burrell, Jr. and Magistrate Judge Edmund F. Brennan for all further proceedings. IT IS FURTHER ORDERED that the Clerk shall make the appropriate adjustment in the assignment of these cases to compensate for this reassignment. Clerk is directed to serve the parties in 2:07-cv-2770 with the undersigned's scheduling order in pro se cases. (Waggoner, D) (Entered: 05/05/2008)
05/05/2008		SERVICE BY MAIL: 13 Order served on Illa L. Garcia and Mary A Jasso (Waggoner, D) (Entered: 05/05/2008)
05/05/2008	14	CIVIL NEW CASE DOCUMENTS ISSUED; Initial Scheduling Conference set for 9/10/2008 at 10:00 AM in Courtroom 25 (EFB) before Magistrate Judge Edmund F. Brennan. (Attachments: # 1 Consent Forms) (Waggoner, D) (Entered: 05/05/2008)
05/05/2008		SERVICE BY MAIL: 14 Civil New Case Documents served on Illa L. Garcia and Mary A Jasso (Waggoner, D) (Entered: 05/05/2008)

08/11/2008	15	ORDER signed by Magistrate Judge Edmund F. Brennan on 08/11/08 ORDERING that defendants are hereby directed to renotice their 5 Motion to Dismiss for hearing before the under-signed; the 14 09/10/08 initial scheduling conference is VACATED pending hearing and decision on the motion. (Benson, A) (Entered: 08/11/2008)
08/11/2008		SERVICE BY MAIL: 15 Order served on Illa L. Garcia and Mary A. Jasso. (Benson, A) (Entered: 08/11/2008)
08/19/2008	16	SECOND AMENDED MOTION to DISMISS by Glen Nash, Richard Williams, Michael D. Ensminger, Al Muir, Rich Zanni, Brad Lutts, California Department of Forestry and Fire Protection, Barry Hemphill. Motion Hearing set for 9/19/2008 at 10:00 AM in Courtroom 25 (EFB) before Magistrate Judge Edmund F. Brennan. (Walter, James) Modified on 8/20/2008 (Engbretson, K.). (Entered: 08/19/2008)
08/25/2008	17	MINUTE ORDER by CRD: The 09/19/08 hearing re Deft's Second Amended Motion to Dismiss 16 is VACATED. The 09/19/08 date selected by Deft does not comply with the Court's scheduled Law and Motion calendar. If Deft wishes to set this matter for hearing, he is directed to contact the Courtroom Deputy for Magistrate Judge Brennan to obtain available Law and Motion dates. (Text only entry) (Cannarozzi, N) (Entered: 08/25/2008)
08/25/2008	18	Defendants' 3RD AMENDED MOTION to DISMISS amending 16 MOTION TO DISMISS. Motion Hearing set for 10/1/2008 at 10:00 AM in Courtroom 25 (EFB) before

		Magistrate Judge Edmund F. Brennan. (Walter, James) Modified on 8/28/2008 (Mena-Sanchez, L). (Entered: 08/25/2008)
09/26/2008	19	MINUTE ORDER by CRD: Defendants' 3RD AMENDED MOTION to DISMISS 18 presently calendared for hearing on 10/01/08 is ordered submitted without appearance and without argument pursuant to Local Rule 78-230(h). (Text only entry) (Cannarozzi, N) (Entered: 09/26/2008)
09/26/2008		SERVICE BY MAIL: 19 Minute Order served on Illa L. Garcia and Mary A. Jasso. (Cannarozzi, N) (Entered: 09/26/2008)
03/12/2009	20	FINDINGS and RECOMMENDATIONS signed by Magistrate Judge Edmund F. Brennan on 3/12/09 recommending that Dfts'18] motion to dismiss be granted. Plaintiffs' complaint be dismissed without leave to amend. The Clerk be directed to close the case. Objections due within ten days after being served with these findings and recommendations. (Duong, D) (Entered: 03/12/2009)
03/12/2009		SERVICE BY MAIL: 20 Findings and Recommendations served on Illa L. Garcia and Mary A. Jasso. (Duong, D) (Entered: 03/12/2009)
03/31/2009	21	ORDER signed by Judge Garland E. Burrell, Jr on 3/30/2009 ORDERING the proposed Findings and Recommendations filed March 12, 2009, are ADOPTED; Dfts' motion to dismiss, Dckt. No. 18, is granted; Pltfs' complaint is dismissed without leave to amend; and the Clerk is

		directed to close the case. CASE CLOSED. (Matson, R) (Entered: 03/31/2009)
03/31/2009	22	JUDGMENT entered pursuant to Order entered on *3/31/2009* and signed by Judge Garland E. Burrell, Jr on 3/30/2009. (Matson, R) (Entered: 03/31/2009)
03/31/2009	22	SERVICE BY MAIL: 21 Order Adopting Findings and Recommendations, 22 Judgment served on Illa L. Garcia, Mary A. Jasso. (Matson, R) (Entered: 03/31/2009)
04/06/2009	23	REQUEST (motion) to alter or amend judgement by Illa L. Garcia, Mary A. Jasso. (Gaydosh, J) (Entered: 04/07/2009)
04/17/2009	24	ORDER signed by Judge Garland E. Burrell, Jr on 4/16/2009 DENYING 23 Motion to Alter or Amend a Judgment filed by Mary A. Jasso, Illa L. Garcia. (Reader, L) (Entered: 04/17/2009)
04/17/2009		SERVICE BY MAIL: 24 Order served on Illa L. Garcia, Mary A. Jasso (Reader, L) (Entered: 04/17/2009)
04/29/2009	25	NOTICE of APPEAL by Mary A. Jasso as to 21 Order Adopting Findings and Recommendations, 22 Judgment. (Attachments: # 1 Docketing Statement)(Streeter, J) (Entered: 04/29/2009)
04/29/2009		RECEIPT number #CAE200016394 $455.00 fbo Mary Jasso by Mary Jasso on 4/29/2009. (Streeter, J) (Entered: 04/29/2009)
05/01/2009	26	APPEAL PROCESSED to Ninth Circuit re 25 Notice of Appeal filed by Mary A. Jasso. Filed dates for Notice of Appeal *4/29/2009*, Complaint *12/26/2007* and Appealed Order / Judgment *3/31/2009*. Court Reporter: *None*. *Fee Status:

		Paid on 4/29/2009 in the amount of $455.00* ** (Attachments: # 1 Appeal Notice) (Kastilahn, A) (Entered: 05/01/2009)
05/01/2009		CERTIFICATE of RECORD transmitted to Ninth Circuit re 25 Notice of Appeal filed by Mary A. Jasso for USCA Case Number ** Hearing Dates of *None* (Kastilahn, A) (Entered: 05/01/2009)
05/01/2009		SERVICE BY MAIL: 26 Appeal Processed to USCA, 27 Certificate of Record served on Illa L. Garcia, Mary A. Jasso and USCA. (Kastilahn, A) (Entered: 05/01/2009)
05/11/2009	28	TRANSCRIPT DESIGNATION and ORDERING STATEMENT by Mary A. Jasso. (Engbretson, K.) (Entered: 05/12/2009)

EXHIBIT 8

United States Supreme Court Docket.
Rehearing Petition Denied,
March 3, 2008. (Case No. 07-604)

No. 07-604
Title: Illa L. Garcia and Mary A. Jasso, Petitioners
v.
California Department of Forestry and Fire Protection, et al.
Docketed: November 7, 2007
Lower Ct: Court of Appeal of California, Third Appellate District
Case Nos.: (C053667, C053793)
Decision Date: May 25, 2007

Discretionary Court Decision Date: August 8, 2007

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 2 2007	Petition for a writ of certiorari filed. (Response due December 7, 2007)
Dec 19 2007	DISTRIBUTED for Conference of January 11, 2008.
Jan 14 2008	Petition DENIED.
Feb 5 2008	Petition for Rehearing filed.
Feb 13 2008	DISTRIBUTED for Conference of February 29, 2008.
Mar 3 2008	Rehearing DENIED.

EXHIBIT 9

California Supreme Court Denial, dated August 8, 2007

SUPREME COURT

FILED
AUG – 8 2007
Frederick K. Chirlch Clerk

Court of Appeal, Third Appellate District – Nos. C053667/C053793

S153684

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ILLA L. GARCIA, Plaintiff and Appellant
v.
DEPARTMENT OF FORESTRY AND FIRE PROTECTION et al., Defendants and Respondents.

AND COMPANION CASE.

The petition for review is denied.

GEORGE
Chief Justice

EXHIBIT 10

California Court of Appeals
Third Appellate District,
dated May 5, 2007

Filed 5/25/07

Garcia v. Dept. of Forestry and Fire Protection CA3.

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publica-tion or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Lassen)

C053667
(Super. Ct. No. 42425)
ILLA L. GARCIA,
Plaintiff and Appellant, v.

DEPARTMENT OF FORESTRY AND FIRE PROTECTION et al.,
Defendants and Respondents.
C053793
(Super. Ct. No. 41697)
MARY A. JASSO,
Plaintiff and Appellant,
v.
DEPARTMENT OF FORESTRY AND FIRE PROTECTION et al.,
Defendants and Respondents.

In these consolidated appeals of their dismissed personal injury actions, two in propria persona plaintiffs attempt to evade the exclusivity of the workers' compensation system by claiming that the injuries they suffered violated the fundamental public policy of the State of California. From a layperson's perspective, negligent, willful and, worse yet, egregious misconduct by an employer offends our basic notion of the state's public policy to protect its employees. But plaintiffs misunderstand the nuances of the law and the finely tuned "public policy" exception to exclusivity. Because none of plaintiffs' causes of action fit within that narrow exception, the trial court properly sustained the public agencies' demurrers without leave to amend. We affirm.

FACTS

We take the facts, as we must, from the allegations set forth in the second amended com-plaints. *(Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Mary Jasso and Illa Garcia were both employed by the California Department

of Forestry and Fire Protection (CDF) as seasonal fire lookouts on Likely Mountain. Jasso worked for eleven fire seasons, Garcia for 3. Both alleged they suffered a vast array of physical injuries as a result of radiation poisoning from exposure to toxic radio frequency and micro-wave radiation emitted from the telecommunications equipment on the lookout and the telecommunications towers. A number of state agencies lease or use the equipment.[1] CDF also provided plaintiffs a trailer as on-site living quarters for all lookouts who worked at Likely Mountain.

Jasso alleged four causes of action: dangerous condition of public property, failure to protect against

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1 The defendant agencies include: California Department of Forestry and Fire Protection, California Department of Fish and Game, California Department of Transportation, California Highway Patrol, and California Department of General Services.

injury and to perform the mandatory duty pursuant to Government Code section 815.6, strict liability for ultrahazardous activity, and concealment of a dangerous condition of hazardous work-place and hazardous employment without consent. In essence, Jasso complains she was never warned about the risks of radiation exposure, a dangerous condition and ultrahazardous activity, and had she known she would have terminated her employment. She further alleges that state and federal statutes and regulations create a mandatory duty to provide a "safe work site and/or place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm to their employees," to conduct environmental assessments to insure that employees were not exposed to "radiofrequency, micro wave and other telecommunication radiations from their telecommunication devices," and to post warning signs of the clear and present dangers on the site.

In her fourth cause of action, Jasso further alleges that defendants "concealed all facts of the hazardous and dangerous" exposure to radiation on Likely Mountain. Because she never gave her consent to work in hazardous conditions or to be exposed to radiation, Jasso contends her employer "acted outside the scope of plaintiff Mary Araina Jasso's employment." In conclusion, she alleges she has "an inherent Right to Life free of oppression and harm from others and the Right to make choices of where she will work and what risks she will take in that work" pursuant to the "First Amendment of the Constitution of the United States; California Constitution Art. 1. Declaration of Rights Sec. 1; and Charters of Freedom Declaration of Independence Paragraph 2."

Garcia, on the other hand, alleges a single cause of action for negligence per se. She asserts that pursuant to California Code of Regulations, title 8, section 8618, defendants had a duty to post a conspicuous sign warning that radiation may exceed hazard limitations; pursuant to California Code of Regulations, title 47, section 1.1307, subdivision (b), defendants had a duty to prepare an environmental assessment of radiation levels; and pursuant to title 18 United States Code section 1864, defendants were prohibited from using a hazardous and injurious device on federal land. Garcia further alleges she was within the class of persons each of these statutes or regulations was designed to protect and her injuries were the direct, foreseeable, and proximate result of defendants' violations.

The trial court sustained defendants' respective demurrers without leave to amend. In sustaining the demurrer against Jasso's complaint, the court ruled: "Plaintiff's sole and exclusive remedy against the State is worker's compensation. (Labor Code, § 3600; *Colombo v. State of California,* (1991) 3 Cal.App.4th 594 [*(Colombo)]*)

Telecommunications does not rise to the level of conduct contrary to public policy such that an exception to the exclusive remedy of worker's compensation is applicable." Similarly, the court sustained defendants' demurrer against the Garcia complaint, also because her "sole and exclusive remedy against the State is worker's compensation." Jasso and Garcia appeal.

DISCUSSION

"California's workers' compensation scheme was developed early in the 20th century as a result of the inadequacy of the common law that often denied injured workers any recovery for work-related injuries." *(Claxton v. Waters* (2004) 34 Cal.4th 367, 372 *(Claxton) .)* The common law was also slow to allow employees a tort recovery for wrongful discharge based on the long-standing principle that they could be terminated at will. *(Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71.) But in the 1980's and 1990's courts carved a narrow exception allowing wrongful termination cases when the discharge violated a "fundamental public policy" of the state. (See, e.g., *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172 *(Tameny); Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894 *(Stevenson); Rojo v. Kliger* (1990) 52 Cal.3d 65, 90-91 *(Rojo); Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095 *(Gantt).)* In wrongful discharge vernacular, "fundamental public policy" is used to circumscribe the tort. *(Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 669.)

Plaintiffs would have us expand the notion of a breach of "fundamental public policy" in wrongful termination cases to encompass intentional and negligent misdeeds by an employer and exempt such misconduct from the exclusivity of the workers' compensation system. That is not the law. Such an expansion would emasculate the carefully constructed balance achieved by the Legislature's execution of its constitutional

authority to create a comprehensive workers' compensation system. *(Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810 *(Vacanti).) "Section 3600 of the Labor Code provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and section 3601 declares that where the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee." (Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 467-468 *(Johns-Manville) .) "[T]he employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." (Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) The rule of exclusivity is designed to preserve this carefully crafted balance. *(Vacanti, supra,* 24 Cal.4th at p. 811.)

But for every rule, there often lurks an exception with hidden land mines. Quoting the Supreme Court in *Claxton, supra,* 34 Cal.4th 367, 373, plaintiffs insist, "But some claims, including those based on sexual or racial discrimination or other conduct contrary to fundamental public policy, are not subject to the exclusivity provisions of the workers' compensation law." *Claxton* itself is inapposite and irrelevant, standing as it does for the unrelated proposition that the settlement and release of workers' compensation claims on a preprinted form does not release causes of action that are not exclusively subject to the workers' compensation law. *(Id.* at p. 370.) But there is indeed a narrow exception to exclusivity drawn from wrongful discharge cases.

In *Tameny, supra,* 27 Cal.3d at p. 176, the Supreme Court reasoned that "an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action." In subsequent cases applying *Tameny,* the Supreme Court "recognized tort causes of action for wrongful discharge based on sex *(Rojo, supra,* 52 Cal.3d at pp. 90-91), age *(Stevenson, supra,* 16 Cal.4th at pp. 897, 909), and retaliation for testifying truthfully *(Gantt, supra,* 1 Cal.4th at pp. 1086-1087) ." *(City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1159 *(City of Moorpark).* In *City of Moorpark,* the Supreme Court determined that disability discrimination, like sex and age discrimination, could form the basis of a common law wrongful termination case. *(Id.* at pp. 1159-1161.) Discriminatory firings violate the "fundamental public policy" of the State of Califor-nia. *(Id.* at p. 1153.)

In order for a public policy to support a common law tort claim, it must be delineated in a statute or a constitutional provision, it must inure to the benefit of the public rather than the individual, it must be well established, and it must be substantial and fundamental. *(City of Moorpark, supra,* 18 Cal.4th at p. 1159.) Borrowing from the wrongful discharge arena on fundamental public policy, courts found that the compensation bargain *"'cannot encompass conduct, such as sexual or racial discrimination, "obnoxious to the interests of the state and contrary to public policy and sound morality.'"* *(Id.* at p. 1153.) Thus, in these limited cases, the exclusivity of the workers' compensation system does not bar an action at law for damages against the employer.

Plaintiffs misconstrue the breadth of the exception, arguing in essence that any violation of a public policy allows an employee to bring an action at law. They tether their causes of action to a variety of state and federal regulations and statutes to fit within the exception. But in attempting to enlarge the exception they would destroy the balance that is at the heart of the legislatively mandated compensation bargain. The Supreme Court provides a useful template in an analogous case, *Johns-Manville, supra,* 27 Cal.3d 465.

In *Johns-Manville,* the court plainly stated that had the plaintiff there alleged, as plaintiffs do here, that he was injured because the defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protect-tive devices to avoid injury, and violated governmental regulations, "plaintiff's only remedy would be to prosecute his claim under the workers' compensation law." *(Johns-Manville, supra,* 27 Cal.3d at pp. 474-475.) In other words, because the employer's conduct was consid-ered one of the "hazards of the employment," an action at law was barred. *(Id.* at p. 477.) If, how-ever, the employee contracts a disease caused by ingestion of asbestos and the employer, knowing of the employee's condition, deliberately fails to notify him or his doctors, the employee could pursue a tort action for damages for the aggravation to his injuries caused by the employer's fraud. *(Ibid.)*

Plaintiffs do not allege a fraudulent cover up, as in *Johns-Manville,* that aggravated their injuries once defendants became aware of the radioactive poisoning. Rather, their complaints allege the same kind of facts that the Supreme Court held in *Johns-Manville* fall within the exclusive domain of workers' compensation.

While plaintiffs cite various laws and regulations they assert defendants violated, they cite no authority, and we have found none, for their proposition that these

types of statutory violations regarding operations of telecommunications towers are considered conduct contrary to a fundamental public policy of the state as that concept has been narrowly construed in both workers' compensation and wrongful termination cases. Particularly in workers' compensation cases, the exception to the rule of exclusivity is narrowly drawn to pre-serve the legislative balance securing a prompt recovery for injured workers while simultaneously limiting the employers' exposure to tort liability. Moreover, contrary to plaintiffs' assertion that the statutory violations ipso facto violate a fundamental public policy, even the violation of child labor laws has been held to be within the employment bargain and therefore subject to the exclusive jurisdiction of the Workers' Compensation Appeals Board. *(Up-Right, Inc. v. Van Erickson* (1992) 5 Cal.App.4th 579, 583-584.) Similarly, regulatory crimes do not "violate the employee's reasonable expectations and transgress the limits of the compensation bargain." *(Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 723, fn. 7.)

Plaintiffs also make repeated references to violations of their civil rights, citing to various provisions of the state and federal Constitutions. We are somewhat perplexed as to the meaning of these allegations. Their sweeping allegations that defendants' operation of the telecommunication facilities, failure to warn, and failure to monitor radioactivity levels violated their inherent rights to be free of harm, if accepted, would dismantle the workers' compensation system because every injured employee would contend his or her employer's harmful conduct violated the fundamental public policy of the state as embodied in the Constitution. Courts have been careful to narrowly construe the exception to exclusivity so as not to intrude into the Legislature's constitutional prerogative to implement a workers' compensation system.

If, on the other hand, plaintiffs' allegations that their civil rights have been violated are an attempt to state an alternative exemption to exclusivity, they fail to cite any relevant authority. They appear to rely on a federal preemption case, *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 [78 L.Ed.2d 443] , in which the United States Supreme Court held that federal statutes did not preempt state awards of punitive damages for the operation of hazardous devices. The case did not, however, involve workers' compensation or address the issue of exclusivity. Moreover, the holding of the Supreme Court "was overruled by the Amendments Act which specifically bars punitive damages. See 42 U.S.C. § 2210(s))....
"*O'Conner v. Commonwealth Edison Co.* (7th Cir. 1994) 13 F.3d 1090, 1105, fn. 13.) As a result, plaintiffs have failed to demonstrate a viable civil rights action sufficiently independent of their other claims or, put another way, to allege conduct that is not work related. (See *Continental Casualty Co. v. Superior Court* (1987) 190 Cal.App.3d 156, 162.)

In answer to the series of questions posed by plaintiff Jasso, the Labor Code does not exonerate defendants from any malfeasance. Rather, it establishes a different forum for the redress of the injuries Jasso sustained during the course and scope of her employment. If, as plaintiffs allege, defendants violated both state and federal statutes, as well as state and federal constitutional rights, and abrogated their duties to protect, warn, and safeguard the employees who manned the lookout towers on Likely Mountain, they should be held accountable for their dereliction of duty. We do not condone either any intentional or negligent conduct. But the propriety of their conduct is not before us; we consider only the venue in which their conduct will be addressed.

We therefore conclude that because plaintiffs, state employees, affirmatively allege they were injured

while in the course and scope of their employment, no civil action will lie and the trial court properly sustained the demurrer. *(Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96-97.) "[L]awsuits against state agencies are in effect suits against the state." *(Colombo, supra,* 3 Cal. App.4th at p. 598.) Thus, the exclusive remedy of workers' compensation bars a state employee's claims against another state agency. *(Id.* at p. 599.) All defendant state agencies were properly dismissed.

Plaintiff Garcia complains that her "opportunity to file an amended complaint and proceed to trial was unfairly precluded by defendants when they brought in as new facts at the hearing on 5/15/06 without defense counsel[']s knowledge or chance to rebut the new information on new case authority." The "new case authority" was *Colombo, supra,* 3 Cal. App. 4th 594, a case that was decided in 1991, or 15 years before the hearing. Nor did the case relied on by Garcia, *Claxton, supra,* 34 Cal.4th 367, overrule *Colombo* as Garcia asserts. Defendants rely on *Colombo* for the straightforward proposition that because an action brought against one state agency is a suit against the state, workers' compensation provides the exclusive remedy when a state employee pursues tort claims against another state agency. *(Colombo, supra,* 3 Cal.App.4th at p. 599.) Nor did *Claxton* change, modify, or expand the rule of exclusivity. Rather, in dicta, *Claxton* merely reiterated the narrow exception to exclusivity for those few cases in which an employer's conduct violates fundamental public policy. In short, both old and new law bars Garcia's action at law against her employer for injuries she sustained during the course and scope of her employment.

Garcia makes a feeble attempt to separate her job duties from other times she might have been ex-posed to radiation on Likely Mountain. For example, she argues that on occasion she would be on Likely Mountain to

retrieve some-thing she forgot, to visit a coworker, or to get ready to begin her shift or unwind when the shift was over. These activities are all "closely connected" to her normal job-related duties and, as a consequence, they too are subject to the workers' compensation scheme. *(Vacanti, supra* , 24 Cal.4th at p. 823.)

Because, as the trial court found, workers' compensation provides the exclusive remedy for plaintiffs' injuries, defendants' demurrers were properly sustained without leave to amend. All other issues are moot.

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

HULL, J.

EXHIBIT 11

Plaintiffs Complaint
filed December 26, 2007

Illa Garcia
658-545 Lookout/Adin Road
P.O. Box 585
Bieber, CA, 96009
530-294-5829

Mary Jasso
6081 County Road 64
P.O. Box 85,
Likely, CA 96116
530-233-5150

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ILLA L. GARCIA; individually; and on behalf of herself; **MARY A. JASSO**; individually, and on behalf of herself;	**COMPLAINT for NEGLIGENCE UNDER COLOR OF LAW and in;**

Plaintiffs IN PRO PER vs. **1) CALIFORNIA DEPARTMENT OF FORESTRY & FIRE PROTECTION;** **2) CALIFORNIA DEPARTMENT OF GENERAL SERVICES AND TELE-COMMUNICATIONS DIVISION;** **3) CALIFORNIA DEPARTMENT OF JUSTICE;** And the following State of California Employees and/or former employees: **4) JERRY BROWN;** Individually, and in his Capacity as Attorney General for the State of California; **5) CATHERINE GUESS;** Individually and in her capacity as Deputy Attorney General for the State of California; **6) BARRY HEMPHILL;** Individually and in his capacity as former Deputy Director for California General Services	**VIOLATION of CIVIL RIGHTS;** **[18 U.S.C. §241; 18 U.S.C. §242)** **18 U.S.C. 1864 §(a)(3);** **42 U.S.C. §1983; the First, Fifth and Fourteenth Amendments U.S. Constitution)** **FILED** DEC 26 2007 CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA BY _____ **DEMAND FOR TRIAL BY JURY**

Department of Telecommunications Division; **7) GLEN NASH;** Individually, and in his capacity as Engineering Services Section Head for California General Services Department of Telecommunications Division; **8) RICHARD WILLIAMS;** Individually and in his capacity as Senior Telecommunications Engineer for the California Department of General Services Telecommunication Division, **9) MICHAEL D. ENSMINGER;** individually and in his capacity as Associate Engineer for the California Department of General Services Telecommunication Division; **10) AL MUIR;** Individually, and in his capacity as Operations Region 2 Manager for the California Department of General Services Telecommunication Division; **11) RICH ZANNI;** individually and in his capacity as Area No. 2 Supervisor for the California	

Department of General Services Telecommunication Division; **12) BRAD LUTTS;** individually and in his capacity as Unit Chief Modoc Lassen Unit California Department of Forestry and Fire Protection and DOES 1-100.	

1. PLAINTIFFS ILLA L. GARCIA and MARY A. JASSO, joined together under F.R.C.P. section 20(a), jointly and severally; do hereby allege and complain as follows.

2. Plaintiffs are unaware of the true names and capacities of the DOE Defendants sued herein as Doe Employees 1 through 100, inclusive, and therefore sues these defendants by such fictitious names. Plaintiffs are informed and believe and thereon alleges; that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged and that Plaintiffs' injuries as herein alleged were proximately caused by the aforementioned Defendants. Plaintiffs will seek leave of this court to amend this complaint to reflect the true names and capacities of said Defendants, when the same becomes known to Plaintiffs.

3. At all times mentioned herein, Plaintiffs are informed and believe, and on the basis of that information and belief alleges, that each of the Defendants were the agents, servants, or employees of each of the remaining defendants. Further, defendants, and each of them, in doing the things herein-after alleged, were at all times acting within the course and scope of said agency, service,

or employment, and with the per-mission and consent of each of the other defendants.

I

JURISDICTION AND VENUE

4. This Court has jurisdiction and venue pursuant to 18 U.S.C. §1864(e); 28 U.S.C. §1331, §1343(a)(3)(4), and §1357; 42 U.S.C. §1983, and §1988; and 47 U.S.C. §505.

II

NATURE OF THE CASE

5. At all times material to this complaint, these plaintiffs declare they are Citizens of the United States, and as such fall under the umbrellas and protection of Article 6, clause 2, and the First, Fifth, Seventh and Fourteenth, Amendments of Constitution of the United States, and the OSH Act of 1970, including section 654.

6. Plaintiffs hereby, complain:

a) Allegedly; the defendants State of California, California Department of Forestry and Fire Protection (hereafter known as CDF) and California Department of General Services Telecommunications Division (hereafter known as GSTD) and/or their employees did have control over the operation, installation, leasing and use of various antennae which do and/or did emit and radiate toxic radio-frequency, microwave and electromagnetic radiation (hereafter known as EMF radiation) at their Likely Mountain Lookout worksite and Telecommunications site (hereafter known as LMT), between the years 1992 through 2002, the relevant years plaintiffs were employees for defendant CDF at LMT.

b) Allegedly; the defendants CDF and GSTD had mandatory duties to post warnings of possible EMF radiation exposure at LMT; to implement safety procedures and provide plaintiffs a safe hazard free work area and to provide training and personal pro-

tective equipment to plaintiffs Garcia and Jasso, who were assigned to work at LMT between the years of 1992 through 2002.

c) Allegedly; the defendants CDF and GSTD posted no signs and did not verbally or in written form warn the plaintiffs they were working in a known hazardous EMF radiation area.

d) Allegedly; the defendants failed to provide plaintiffs a safe work environment and/or area at LMT and allegedly; the defendants did not implement any safety procedures to protect plaintiffs from toxic EMF radiation exposure, nor did they train plaintiffs in the dangers of EMF radiation exposure, or provide plaintiffs with protective equipment.

e) Allegedly: defendants failed to comply with relevant statue in regards to their telecommunications operations and use at LMT and committed acts and conduct under color of law and as a result defendants malfeasance, plaintiffs suffered detrimental harm to mind and body, permanent disability, deprivation of life, liberty, equal protection of the laws and due process.

f) Allegedly; the defendants State of California, CDF, GSTD, fraudulently concealed from the plain-tiffs their LMT work-site was a known hazardous and toxic EMF radiation area.

g) Allegedly; after the defendants were notified of the plaintiffs' injuries, the defendants CDF, GSTD, California Department of Justice (hereafter known as CDJ), and/or their employees engaged in and/or participated in the production and/or submission of alleged false and misleading documents to the Courts, as well as to various other Federal and State entities, as well as California State Insurance Fund and the California Fire Fighters and/or other interested parties.

h) Allegedly; the defendants CDF, GSTD, California Department of Transportation (hereafter

known as DOT) and defendant CDJ, once informed that the plaintiffs had suffered EMF radiation exposure and injury at LMT, individually, and in concert with each other, engaged in and/or participated in the conspiracy to conceal the true facts of radiation levels that could be found at likely Mountain between the years 1992 through 2002, and in general participated in an Abuse of Powers by their own departments and the powers of the Courts with their alleged submission of false and misleading documents and statements to the Courts and regulatory entities and/or that are in place to protect the plaintiffs' interests for relief and damages for injuries suffered at the hands of the defendants.

i) Allegedly; the defendants lease to non-state entities.

III
FACTS

7. Plaintiff Illa Garcia worked as a seasonal lookout for California Department of Forestry and Fire Protection (hereafter known as CDF) at LMT, beginning on or about the year 2000 and continuing through the year 2002, for a total of three fire seasons which in general spanned from May through October of any given year. During the aforementioned years, fire seasons, and months, plaintiff Illa Garcia, also lived at LMT in living quarters provided by defendants CDF, when on duty and/or on standby and/or otherwise, visiting LMT in an off duty capacity between the aforementioned years.

8. Plaintiff Mary Jasso worked as a seasonal lookout for CDF at LMT, beginning on or about the year 1992 and continuing through the year 2002, for a total of eleven fire seasons which in general spanned from May through October of any given year. During the aforementioned years, fire seasons and months, plaintiff Mary Jasso lived at LMT in living quarters provided by

CDF, when on duty and/or otherwise, visiting LMT in off duty capacity between the aforementioned years.

9. The defendants CDF between the years 1992 through 2002, maintained and staffed a fire lookout tower at LMT and employ the plaintiffs to staff the lookout tower. During this same period of time, both defendants CDF and GSTD, also did and/or do own, use, and operate telecommunications equipment and devices at LMT and lease services to other telecommunication users at LMT.

10. By all known consensus, telecommunication devices, i.e., antennae, emit EMF radiation and creates radiation fields which allegedly do couple to each other creating larger fields and which do couple to and/or reradiate off, nearby metal structures and do couple to the human body, having a predilection for water based biological organs and said radiation fields then general high radiofrequency voltage and create hazardous shock/burns and injury for those so exposed. Plaintiffs do allege they suffered continuous daily the shock/burn phenomena when they touched metal surfaces at LMT, including the kitchen sink in the living quarters provided by defendant CDF.

11. Allegedly, the following structures and items are and/or were metal based at the time the plaintiffs were present at Likely Mountain between the years 1992 through 2002.

a) LMT lookout tower is constructed of metal.

b) Radio vault (building) that houses the defendants and their lessees transmitting equipment located at the base of the lookout tower is metal.

c) The back-up generator vault located next to the radiovault is metal.

d) The temporary RV living quarters provided by defendants CDF at LMT was metal.

e) The appliances inside the living quarters were metal.

f) The automobiles plaintiffs, defendants, numerous other government entities, numerous other telecommunication users at LMT and numerous members of the Public who visited the lookout tower site used to come and go in at LMT were metal.

g) The chairs that lookouts and visitors used to sit in the lookout's cab were metal.

h) The map ring in the center of the lookout cab, used by lookouts to give map location of smokes and wildfires was metal.

i) The large WWII binoculars that the look-outs (plaintiffs) used (pressed against their eyes when in use and that lay against their breasts when not in immediate use) were metal.

j) The plaintiffs touched, used, lived, rode and climbed all the aforementioned structures and items each and every day they were at LMT.

12. Allegedly, defendants took no action to warn or protect workers that worked at LMT, from their and their lessees dangerous radiation emitting antennae at LMT, which allegedly is a mandatory duty, not a discretionary duty pursuant to the OSH Act of 1970 (29 USC 654), and the multi-employer doctrine (OSHRC Docket No. 97-1946) and other relevant statue. (See footnote No. [1], pg. 12).

13. Allegedly the defendants did not follow the mandates set out in 47 C.F.R. §1.1307(b); at LMT, that require environmental assessments.

14. Plaintiff Illa Garcia, who suffered illness beginning on or about July 2002, became permanently disabled on or about April 2004.

15. Plaintiff Mary Jasso, who suffered illness beginning on or about July 2002, became permanently disabled on or about October 2002.

16. Neither plaintiff Illa Garcia or Mary Jasso became aware and/or suspected that their job as lookouts at LMT, had exposed them to toxic EMF radiation until on or about late November 2003.

17. Upon subsequent research and investigation the plaintiffs found their worksite at LMT had allegedly been a highly hazardous and toxic work site area and hereby allege that fact was concealed from them by defendants.

18. After subsequent medical testing beginning on or about February 2004 and continuing through present day, the Plaintiffs were found to have toxic brain and blood cell damage, tumors, cataracts, tremors, loss of hearing, breathing difficulties, paralysis and other physical damage to their bodies.

19. Plaintiffs hereby allege the toxic brain, blood cell and other body damage they suffered and suffer from was a direct and proximate result of the EMF radiation exposure they suffered from defendants and their lessees radiation emitting antennae at LMT.

IV.

FIRST COUNT

For Alleged Negligence Under Color of Law (18 USC §242; 42 USC §1983; 5th & 14TH Amendment U. S. Constitution)

20. Paragraphs 1 through 19, are hereby incorporated by reference.

21. Pursuant to the General Duty Clause of the OSH Act of 1970, section 5(a) [29 USC §654]; and other relevant statue, [1] defendants State of California, CDF and GSTD, at all times were under a mandatory duty to

protect the plaintiffs from toxic work-site environments, harmful EMF radiation exposure, and injury.

22. Allegedly the defendants failed in their mandatory duty to protect the plaintiffs from toxic work-site environments, harmful EMF radiation exposure, and injury and as a direct and proximate result of defendants alleged failure, the plaintiffs suffered severe detrimental injuries to their bodies, permanent disabilities, deprivation of life, quality of life and memories of life, and were denied the freedom to choose what toxic exposure risks they would allow themselves to be exposed to and were denied the equal protection of the laws enacted to protect those who worked at telecommunication sites.

V
SECOND COUNT
State Created-Danger Under Color of Law
(18 USC 242; 18 USC 1864(a)(3); 42 USC §1983; 5th & 14TH Amendment U. S. Constitution)

23. Paragraphs 1 through 22, are hereby incorporated by reference.

24. Allegedly, the defendants State of California, CDF and GSTD placed the plaintiffs in harm's way without the plaintiffs' knowledge of the toxic condition of their work-site and without the plaintiffs consent to be harmed by the defendants and/or the defendants radiation emitting telecommunications operations and devices and therefore, when the plaintiffs allegedly suffered injury from EMF radiation exposure, the

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[1] **a)** 29 C.F.R. § 1910.268(a)(3); (c)(1)(p)(2)(3); 47 C.F.R. §1.1307(b); §1.1310. **b)** Fifth and Fourteenth Amendments U.S. Constitution. **c)** California Code of Regulations, Title 8; §340; §340.2; §5085; 8603; 8605; 8617; §8618. **d)** California Constitution; Article 1, §1; §7(a).

defendants acted under color of law and were in violation of plaintiffs' civil rights pursuant to the Fifth and Fourteenth Amendments of the Constitution of the United States.

25. Defendants knew or should have known that when they placed the plaintiffs to work at LMT, they were exposing [2] them to an invisible airborne toxic assault by EMF radiation being emitted by their hazardous radiation emitting devices, i.e., antennas and microwave dishes at LMT, and it was foreseeable that without training and protection from the EMF radiation assault, plaintiffs would suffer harm and severe injuries from the EMF radiation exposure.

26. Plaintiffs allege they did suffer harm from toxic EMF exposure at defendants LMT work-site as result of defendants negligence under color of law and the injuries that plaintiffs suffered, allegedly, are considered to be willful and intentional pursuant to 47 C.F.R. §312(f); [3] and include brain damage of such a degree that the plaintiffs have suffered both short term and long term memory loss and have been given a prognosis of slow and

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[2] ***"EXPOSE"*** *"1. a) to lay open (to danger, attack, ridicule, etc.); leave unprotected."* Webster's New World Dictionary of the American Language, Encyclopedic Edition (1952)(pg. 512).

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[3] 47 USC §312(f) *"For purposes of this section:*
"(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.
(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

continuing diminished cognitive and mental capacity. Plaintiffs believe the diagnosis and prognosis of increasing diminished mental capacity is more probable than not, true, as the plaintiffs have, and/or are already suffering memory loss, confusion, anxiety, depression, time lapses and Alzheimer's and dementia-like symptoms.

27. In other words, these plaintiffs hereby, complain their lives have been corrupted, interrupted, shortened, economically threatened and have ceased to be normal because of defendants and/or their employees alleged negligent acts and conduct under color of law.

VI
COUNT THREE
ABUSE OF POWERS
(Under Color of Law 18 USC §241; §242; 42 USC §1983; 42 USC §1985; 5th & 14TH Amendments, U. S. Constitution)

28. Paragraphs 1 through 27, are hereby incorporated by reference.

29. The defendants own, use, operate, maintain, and lease telecommunications service at LMT. They have control over two of the telecommunication towers at LMT. The Lookout Tower which has both antenna and microwave dishes and the Wood-Pole Tower which contains numerous and various type antennae.

30. The defendants CDF and GSTD also lease telecommunications services to other government entities and non-state entities and at all times exercise control of their lessees telecommunications equipment and antenna and in most cases purchase, install, repair, replace and main-

tain the various antennae of their lessees in addition to their own antennae.

31. Upon learning the plaintiffs had alleged EMF radiation exposure and injuries, the defendants CDF and GSTD, allegedly, failed to investigate or police themselves or their lessees for their failure to do mandatory duty and allegedly failed to notify their lessees there had been complaints of EMF radiation exposure due to negligence.

32. It was plaintiffs, themselves, who notified defendants lessees Modoc National Forest Service and Federal Bureau of Land Management on or about April of 2004, there was a problem of safety at LMT.

33. Defendants CDF and GSTD and/or their employees, allegedly, countered plaintiffs claims with reassurances to any government agencies making inquiries that there was no danger LMT and plaintiffs injuries and disabilities were not due to EMF radiation exposure.

34. Defendants GSTD and/or their employees allegedly produced test documents on or about February 2005 and September 2006, that stated no radiation levels were found to be above that allowed by current FCC standards.

35. Defendants CDF, GSTD, and CDJ allegedly submitted the State's test result to various Courts and government agencies as proof the plaintiffs were not injured at LMT.

36. Allegedly, the defendants CDF, GSTD and/or their employees were aware the tests results and statements were false and misleading and were being produced solely for the purposes of exonerating the State and defendants from liability and prosecution.

37. Allegedly, the defendants CDF, GSTD, CDJ and DOT, and/or their employees conspired together to submit false and misleading documents and statements

to fraudulently conceal the true levels of radiation and the hazardous conditions at LMT, and it is plaintiffs belief the defendants obstructed justice by their abuse of powers and defrauded the Courts of Law, and hindered and obstructed the plaintiffs requests and/or actions for economic relief for their injuries and damage and urgent medical care, equal protection of the laws and due process.

VII
CONCLUSION

38. The Plaintiffs pursuant to 42 USC §1981(a); have the right to sue and pursuant to the First, Fifth and Fourteenth Amendments of the Constitution of the United States, also have the right to full and equal protection of all laws.

39. These Plaintiffs are and/or were at all relevant times they were at LMT, innocent bystanders, victims and the class of persons that the law, Act, Article, and regulations of the United States, and State of California, were enacted to protect and that have been used and/or referred to in this complaint, supra.

VIII
PRAYER FOR RELIEF

WHEREFORE, The Plaintiffs demand a trial by jury and pray for judgment against the defendants, individually, severally and/or jointly, and for relief in the amounts specified and unspecified below.

1. Award damages and relief in an amount in excess of $12,500,000, per plaintiff pursuant to 18 U.S.C. 1864(e); and 42 U.S.C. §1985.

2. Award Plaintiffs costs, expert witness fees and reasonable attorney fees in accordance with 18 U.S.C. 1864 §(e); USC §1988; and,

3. For interest on aforesaid amount at a legal rate from and after the time when it was found that said amounts were due to Plaintiffs;

4. Award such other necessary and proper relief as this Honorable Court may deem just and equitable.

December 19, 2007

s/ILLA L. GARCIA s/MARY A. JASSO